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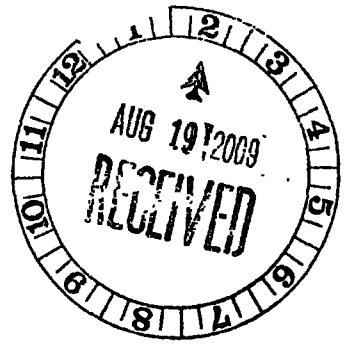
BEFORE THE SURFACE TRANSPORTATION BOARD

PENNSYLVANIA RAILROAD COMPANY	)	
	)	
--MERGER--	)	Finance Docket No. 35289
	)	
NEW YORK CENTRAL RAILROAD COMPANY	)	

PENN CENTRAL TRANSPORTATION COMPANY'S PETITION FOR REVIEW OF ARBITRATION DECISION



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Pursuant to 49 U.S.C. §§ 11323 & 11326 and 49 C.F.R. § 1115.8, Penn Central Transportation Company ("Penn Central") appeals the arbitration decision issued by Steven H. Steinglass (neutral arbitrator) and Dennis R. Lansdowne (claimants-appointed arbitrator) (collectively, the "Split Panel")[1] on July 30, 2009 in favor of 32 former railroad workers (the "Claimants") for benefits under the 1964 Merger Protection Agreement among the Pennsylvania Railroad Company, the New York Railroad Company, and Brotherhood of Railroad Trainmen ("MPA").

INTRODUCTION

It took Chairman Steinglass 19 months from the conclusion of the arbitration, 16 months from the parties' submission of findings of fact and conclusions of law, and over 180 pages of "analysis" to render a decision. All of this time and pages were needed for the Split Panel to circumvent the plain language of the MPA and the clear and unambiguous record in the arbitration.

Ironically, Chairman Steinglass repeatedly goes out of his way throughout the decision to berate Penn Central for supposed historical delay in the proceedings before his appointment,

[1] The third panel member, Joseph P. Tomain (carrier-appointed arbitrator), who is Dean Emeritus at the University of Cincinnati College of Law, did not join the Panel's majority decision and filed a dissenting opinion.

even going so far as to "enhance" the $560,000 award by $12.5 million in compounded prejudgment interest without any basis in the controlling agreements between the parties to do so. Undoubtedly, Chairman Steinglass' actions were in response to Penn Central's earlier motion to recuse him on the grounds of evident partiality, which motion he quickly, summarily denied without any input from the other two arbitrators.[2] Given the decision's fundamental disregard of the MPA and factual record, the only explanation for the outlandish award besides sheer irrationality is the bias of the "neutral" arbitrator who was proposed by the Claimants.

The federal courts during the previous history of these proceedings framed three issues for the Split Panel to decide. Each Claimant, not Penn Central, bore the burden of proving each requirement, and a Claimant could not recover benefits without prevailing on all three issues. First, the causation requirement -- was each Claimant "placed in a worse condition with respect to their employment **by reason of the merger**?"[3] The Split Panel committed reversible error by simply eliminating the causation requirement explicitly contained in the MPA. The Split Panel ignored the overwhelming and **unrebutted** evidence conclusively demonstrating that the Claimants were furloughed or otherwise adversely affected because of a decline in rail passenger traffic, not as a result of the merger. For this reason alone, the Board should vacate the arbitration award of benefits.

Second, the conditions precedent or work-related requirement -- had each Claimant "complied with the MPA's requirements so as to warrant an award of benefits?"[4] The Split Panel committed reversible error by improperly shifting the burden of proof to Penn Central to

[2] Chairman Steinglass received the Motion to Recuse at 8:00 p.m. on a Friday, and denied the Motion at 7:30 a.m. on that Monday. Incredibly, Chairman Steinglass decided the Motion without consulting the other two arbitrators. It wasn't until over a week later on November 6, 2007 that Chairman Steinglass conferred with the panel, and then sent an email to the parties that stated "the decision concerning the recusal of the neutral arbitrator should be made by the neutral arbitrator and not the full panel." Appendix Vol. 4 at Appendix-2263.

[3] 1976 Judge Lambros Oral Ruling, Appendix Vol. 2 at Appendix-0694. (emphasis added).

[4] *Augustus v. Surface Transportation Board*, 2000 U.S. App. LEXIS 33966, at *5 (6th Cir. 2000)("*Augustus*") (Appendix Vol. 1 at Appendix-0410).

disprove compliance with work-related requirements – or conditions precedent – to receive benefits under the MPA. Moreover, the Split Panel failed to provide any evidentiary basis for its findings instead disregarding the evidence of record that work-related requirements were not met. For this reason alone, the Board should vacate the arbitration award of benefits.

Third, compensation loss requirement -- did each Claimant come forward with evidence of "compensation loss to which they are entitled to payment?"[5] The Split Panel committed reversible error by awarding damages based on the Claimants' expert damage calculations that, quite literally, were made up by their expert. The MPA provides very detailed and specific instructions as to how damages are to be calculated. On cross-examination, Claimants' expert admitted that he did not follow the terms of the MPA in calculating damages. He deviated from the terms of the MPA not once or twice but numerous times. Indeed, he admitted that when he did not have the data required by the agreement he substituted his own made-up data. For this reason alone, the Board should vacate the arbitration award of benefits.

Not only did each Claimant fail to prove each of the foregoing three requirements, but the Split Panel compounded its egregious error of awarding a total of $560,000 in benefits by penalizing Penn Central with prejudgment interest of more than $12.5 million – more than 22 times the total amount of the principal award! Such a penalty is not provided for in either the MPA or the implementing arbitration agreement and is not permitted by law.

PROCEDURAL HISTORY

The relevant procedural history in this matter spans over forty years and is well documented in the record submitted with this Petition and is therefore highlighted only briefly here. Prior to the appealed arbitration, various other finders of fact, including the federal District Court in Ohio and two previous arbitration panels, have heard these claims and, each time,

[5] 1976 Lambros Ruling, Appendix Vol. 2 at Appendix-0710.

Claimants have appealed the result – first to this Board, then to the Sixth Circuit Court of Appeals. These various adjudicatory tribunals framed the issues to be decided in this matter.

The New York Central Railroad and the Pennsylvania Railroad applied to the Board's predecessor, the Interstate Commerce Commission ("ICC"), in 1962 to consolidate their operations. The two railroads and their unions entered into the MPA in 1964 to provide certain benefits to any worker who was adversely affected as a result of the planned consolidation of the two railroads. The ICC exercised its exclusive jurisdiction under 49 U.S.C. § 11347 (now § 11326) to approve the merger in 1966 including approving and adopting the MPA. In 1968, the two railroads merged into one -- Penn Central. In the ensuing six years, both before and after Penn Central filed in 1970 for reorganization protection under Section 77 of the Bankruptcy Act of 1898, Claimants who were employed at the Cleveland Union Terminal ("CUT") filed four suits in federal court alleging entitlement to MPA benefits. Claimants sought, and were granted, leave from the Reorganization Court in the mid-1970s to continue these proceedings.

The District Court later dismissed the federal cases by referring them to arbitration. The parties first arbitrated the *Knapik* action in 1983 but that panel was later disbanded. The parties then arbitrated the *Knapik* action in 1990. The *Knapik* Claimants appealed the arbitration award to this Board, which rendered its decision at STB Finance Docket No. 21989 (Sub.-No. 3) (May 2, 1997). The *Knapik* claimants then appealed to the Sixth Circuit, which rendered its decision at *Augustus v. Surface Transportation Board*, unreported, 2000 U.S. App. LEXIS 33966 (6th Cir. 2000). Upon Claimants' motion, the District Court reassumed jurisdiction over the cases for the limited purpose of referring them to arbitration. Claimants and Penn Central each appointed an arbitrator, and the District Court appointed as the neutral arbitrator, Chairman Steinglass, whose name was submitted by Claimants.

Several objective facts (other than his bizarre opinion) demonstrate that Chairman Steinglass was biased against Penn Central and biased in favor of the Claimants. These objective facts led Penn Central to move to recuse Chairman Steinglass on October 26, 2007. The objective facts demonstrating bias are that: Chairman Steinglass had a close personal relationship with one of the two "named" partners in the firm that Claimants hired as experts and paid more than $43,000 to opine as to the benefits and interest calculation. This relationship included dining in each other's home on numerous occasions and attending several social events together. It also included Chairman Steinglass soliciting and obtaining sizeable charitable contributions from the partner and his firm, none of which Chairman Steinglass revealed for more than 10 weeks and then even not fully. Based on the foregoing, Penn Central moved to recuse Chairman Steinglass, who immediately refused to recuse himself.

The arbitration occurred over four days in December 2007, the parties submitted findings of fact and conclusions of law in March 2008, but the arbitration award was not rendered until July 30, 2009. The very next day, on July 31, 2009, Claimants filed with the District Court a motion to confirm the arbitration award despite this Board's exclusive jurisdiction to hear this merits appeal. That motion is still pending and Penn Central will timely respond.

One issue that is not before the Board is whether the Split Panel's award – which purports to be against not only Penn Central but also the reorganized company that emerged from Penn Central's reorganization, American Premier Underwriters, Inc. ("APU") – is enforceable against APU. This issue is a pure bankruptcy issue that has been reserved for, and is within the exclusive jurisdiction of, Senior Judge Fullam of the Eastern District of Pennsylvania who has presided over Penn Central's reorganization from the beginning. Penn Central is the

only party ever sued by the Claimants. At no time have the Claimants ever sought to join the reorganized company, APU.

STANDARD OF REVIEW

Under the *Lace Curtain* standard, this Board uses a "sliding scale of deference" in reviewing arbitration awards, *Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806, 812 (D.C. Cir. 1993), deferring to the arbitrator's findings on "minor, factual disputes and exercising its own judgment over broader matters that implicate labor policy." *Black v. Surface Transportation Board*, 476 F.3d 409, 414 (6th Cir. 2007). The Board reviews issues of causation or the resolution of other factual questions for egregious error. *Chicago and Northwestern Transp. Co. – Abandonment*, 3 ICC 2d 729 735-36 (1987) (*Lace Curtain*), aff'd sub nom. *International Bd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). Egregious error means "irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact." See *Am. Train Dispatchers Ass'n v. CSX Transp., Inc.*, 9 ICC 2d 1127, 1130-31 (1993). An arbitration award should be vacated "when there is egregious error, when the award fails to draw its essence from the MPA's labor protective conditions, or when the arbitrator exceeds the specific limits on his authority." *Id.* at 1130.

Under these standards, the Split Panel's decision here was irrational, the result of bias and egregious error, and without foundation in the factual record. The Split Panel ignored the plain language of the MPA, so that their decision fails to draw its essence from the labor protective conditions. Moreover, by awarding compounded prejudgment interest, the Split Panel exceeded the limits of its authority. This Board must therefore vacate the arbitration award.

ARGUMENT

I. In Deciding the First Issue, The Split Panel's Decision Fails to Comply with The Imposed Labor Conditions Because Chairman Steinglass Eliminated the Explicit and Mandatory Causation Requirement in the MPA and Completely Disregarded the Unrebutted Evidence Demonstrating That the Claimants Were Furloughed or Otherwise Adversely Affected by a Decline in Rail Passenger Traffic and Not the Merger

A. The Arbitration Decision Fails to Comply with the Imposed Labor Conditions Because the Split Panel Eliminated the Explicit and Mandatory Causation Requirement in the MPA

The MPA and Washington Job Protection Agreement ("WJPA")[6] specifically require the Claimants to demonstrate that any loss they sustained was **a result of the merger** of the PRR and NYC. If they fail to do so, like they did at the arbitration, they cannot recover benefits under the MPA. Thus, Claimants were first required to demonstrate that they were furloughed from their positions or were otherwise adversely affected **as a result of the merger**. Indeed, when addressing the causation issue, the Split Panel framed the issue as "[e]ligibility for merger protection benefits is governed by the MPA, and **but for the merger** and the resulting coordinations the claimants would not have viable claims for benefits."[7] (emphasis added). However, in its decision, the Split Panel arbitrarily contradicts its own framing of the causation issue and eliminates the Claimants' burden of proving causation by stating that somehow the MPA eliminated the causation requirement of §1 of the WJPA,[8] and finds that "all claimants are eligible for merger protection benefits even if they could not prove that their loss of employment was 'solely due to and resulting from such coordinations' within the meaning of §1(a) of the

[6] The WJPA – a merger protection agreement – was a precursor to the MPA, and also provided certain benefits to employees who became adversely affected as a result of railroad mergers. The WJPA is incorporated into, and is an attachment to, the MPA. *See* Appendix Vol. 1 at Appendix-0459, Appendix-0464.
[7] Arbitration Award, p. 59 (Appendix Vol. 5 at Appendix-2681).
[8] Arbitration Award, p. 62 (Appendix Vol. 5 at Appendix-2684).

MPA."[9] The Split Panel's ruling defies both logic and the express wording of the MPA. Chairman Steinglass literally re-wrote the MPA so that an award to the Claimants could be made. An award to the Claimants is impossible if one rationally applies the clear language of the MPA to the record of the arbitration hearing.

The WJPA – which is expressly incorporated into, and attached as Appendix A to, the MPA – does have a clear and unequivocal causation requirement[10] in §1 as the Split Panel properly points out and that states:

> [T]he fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination . . . and it is the intent that the provisions of this agreement are to be restricted to those **changes in employment** in the Railroad Industry **solely due to and resulting from such coordination** . . .[11]

This clear and unequivocal causation requirement was expressly incorporated into the MPA, as illustrated by the very title of the MPA itself -- "Agreement For Protection of Employees in Event of Merger of Pennsylvania and New York Central Railroads." This express and unambiguous causation requirement is reiterated several times throughout the MPA and its attachments. The third paragraph of the MPA states:

> AND WHEREAS, it is the intent and purpose of Pennsylvania and Central . . . to **effectuate the merger through unification, coordination and consolidation** of their separate facilities, all of which will or may have **adverse effect upon employees** represented by the labor organization parties hereto.[12]

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[9] Arbitration Award, p. 68 (Appendix Vol. 5 at Appendix-2690).

[10] Chairman Steinglass attempts to obviate the clear causation requirement in the MPA by mis-characterizing Penn Central's argument as one advocating a "strict" causation requirement and then professing that no such "strict" causation requirement can be found. This attempt is nothing more than an intellectually dishonest "straw man." Penn Central never used the term "strict causation" nor attempted to imply that there was some causation element in the MPA over and above the one that is so plainly present. The MPA requires the Claimants to prove that the loss of employment was caused by the merger. Period. The Claimants, as the Record demonstrates, offered no evidence at all on this critical issue. Chairman Steinglass cannot relieve the Claimants of their burden of establishing causation by mischaracterizing Penn Central's position.

[11] Appendix Vol. 1 at Appendix-0464 (emphasis added).

[12] Appendix Vol. 1 at Appendix-0459 (emphasis added)

Two paragraphs later, the MPA quotes Section 5(2) of the Interstate Commerce Act[13]:

> As a condition to its approval . . . of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission . . . shall include terms and conditions providing that . . . **such transaction will not result in employees** of the carrier or carriers by railroad **affected by such order being in a worse position** with respect to their employment . . .[14]

Further on the first page, in section 1(a), the MPA continues:

> [U]pon consummation thereof the provisions of the Washington Job Protection Agreement of 1936 . . . shall be applied for the protection of all employees of Pennsylvania and Central . . . who may be **adversely affected** with respect to their compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto **incident to approval and effectuation of said merger** . . .[15]

Even the Sixth Circuit has spoken on the causation issue, ruling that the MPA was "for the protection of employees affected by the proposed merger."[16] In his 1976 Ruling, Judge Lambros also specifically required the Claimants to demonstrate causation, thereby framing the causation issue:

> [W]ere plaintiffs placed in a worse condition with respect to their employment **by reason of the merger**? . . . [I]f the railroad takes the position that they declined work which was available, then of course the merger protection agreement provides that would not be a condition where they were placed in a worse position.[17]

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[13] Revised and recodified as 49 U.S.C. § 11323 - § 11326. As pertains here, the statutory provisions apply to the "consolidation or merger of the properties . . . of at least 2 rail carriers into one corporation . . . ." 49 U.S.C. § 11323(a)(1). See also WJPA, § 2(a) ("The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.")

[14] Appendix Vol. 1 at Appendix-0459 (emphasis added).

[15] *Id.*

[16] *Augustus* at *2. (Appendix Vol. 1 at Appendix-0409-10).

[17] Appendix Vol. 2 at Appendix-0694. (emphasis added).

The language is clear and unambiguous: the Claimants must prove that they were adversely affected **as a result of the merger** before they are entitled to recover benefits. The WJPA contains this causation requirement. The MPA contains this causation requirement. Both the Sixth Circuit and Judge Lambros have similarly ruled and also framed the causation issue that was presented before the Split Panel. However, in the face of the explicit language of the agreements and prior rulings, the Split Panel erroneously argues that while §1(a) of the MPA contains a causation requirement, §1(b) eliminates that requirement.[18] This is not only incorrect, it makes no sense. While §1(a) details the merger protection benefits provided for in the MPA and WJPA, including the causation requirement, §1(b) simply sets forth in detail which employees are covered by the agreement, i.e. employees who suffered job loss **as a result of the merger**. §1(b), in seven separate paragraphs, more fully identifies the class of employees eligible for protection, for example: paragraph 2 defines "present employees"; paragraph 3 requires the submission of a roster to all employees; paragraph 4 describes disqualifications for benefits such as death; paragraph 5 lists emergency conditions; paragraph 6 addresses transfers; and paragraph 7 addresses temporary employees.[19] Nothing in any of the paragraphs in §1(b) eliminates the causation requirement or somehow turns the MPA into a life-time employment guarantee. The Split Panel fundamentally misinterprets §1(b) and completely disregards the mandatory and explicit causation language contained throughout the entire MPA. By ignoring this language – the causation requirement – the Split Panel's decision fails to draw its essence from the imposed labor conditions contained therein, and under the *Lace Curtain* standard, requires reversal by the Board.

[18] Arbitration Award, p. 64 (Appendix Vol. 5 at Appendix-2686).
[19] *See* Appendix Vol. 1 at Appendix-0460 to Appendix-0461.

The Split Panel goes so far as to hold even if it found a causation requirement exists, the *Knapik*, *Watjen*, and *Bundy* Claimants[20] "met . . . any burden that they may have had to establish a nexus between the merger and their subsequent losses of employment."[21] This finding is wholly unsupported by the record. In regard to the *Knapik* Claimants, the Split Panel declares that because the *Knapik* Claimants were furloughed "three weeks after the merger became effective," that this temporal proximity alone establishes the requisite causal connection. A mere temporal relationship, though, is not enough to meet their burden of proving that the merger was the proximate cause of any adverse affect to them under the MPA. *Tuttle v. Metro. Gov't of Nashville*, 474 F.3d 307, 321 (6th Cir. 2007) (temporal proximity, standing alone, is insufficient to establish a causal connection); *Bilow v. Much Shelis Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882, 895 (7th Cir. 2001) (the mere fact that one event preceded another does nothing to prove that the first event caused the second). The overwhelming and unrebutted evidence presented at the arbitration, as discussed more fully below, demonstrated that the *Knapik* Claimants' were not affected by the merger but instead by the decline in rail passenger traffic that occurred both before and after the merger.

As for the *Watjen* and *Bundy* Claimants, the Split Panel states that the January 1969 job abolishment notice received by each Claimant, almost one year after the merger took place -- and that states in relevant part: "positions . . . [were] being abolished as the work you are now performing is being transferred [to a different office]"[22] -- is proof that their loss of employment "resulted from one of the anticipated post-merger activities."[23] The Split Panel does not support

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[20] As to the other group of Claimants – the *Sophner* Claimants – the Split Panel found as it had to: "if there is a strict or proximate cause requirement either for merger protection benefits sought under §1(b) of the MPA or for benefits sought under §1(a) of the MPA and the WJPA, the *Sophner* claimants **did not meet such requirement.**" Arbitration Award, pp. 69-70 (Appendix Vol. 5 at Appendix-2691 to Appendix-2692). (emphasis added).

[21] Arbitration Award, pp. 69-70 (Appendix Vol. 5 at Appendix-2691 to Appendix-2692).

[22] Appendix Vol. 3 at Appendix-1321.

[23] Arbitration Award, p. 70 (Appendix Vol. 5 at Appendix-2692).

this finding with any evidence in the record, because there is no such evidence. This assumption by the Split Panel ignores the evidence in the record – which includes the fact that the merger occurred almost one year prior to Claimants' positions becoming abolished, and like the *Knapik* Claimants, their positions were abolished due to the decline in rail passenger traffic. Neither the Split Panel, nor the Claimants themselves, point to any fact which would suggest otherwise or that the merger was the cause of their jobs being abolished.

B. The Split Panel Committed Egregious Error by Ignoring the Unrebutted Evidence Put Forth by Penn Central's Expert Witness, and the Claimants' Own Testimony, That The Claimants' Job Losses Were Not Caused by the Merger, but by the Decline in Railroad Passenger Service

Although Claimants had the burden of proving they were adversely affected as a result of the merger, the overwhelming and unrebutted evidence put forth at the arbitration by Penn Central clearly shows that the Claimants were furloughed or otherwise adversely affected due to a sharp and substantial decline in passenger service at the CUT, and **not** as a result of the merger. The Claimants themselves testified to this fact – on direct examination – both in their deposition testimony and at the arbitration. For example, Claimant Gallagher, at his deposition, testified:

> Q: During your employment at the CUT, was there a decline in passenger service?
>
> A: I would say yes.
>
> * * *
>
> Q: Okay. So the decline in passenger business resulted in less and less passenger cars coming through the CUT?
>
> A: Yes.
>
> Q: Was that decline in passenger cars that came through the CUT, did that lead to a lack of work for which one could bid off?

A: I don't know. I couldn't really say. Yeah.[24]

Claimant McNeely, at his deposition, testified:

Q: And did you work your entire career at the Cleveland Union Terminal?

A: No. Folded up in '67, the end of passenger trains.[25]

Claimants' witness Mr. Knapik, who worked at the CUT before the merger and continued with first Penn Central and then Conrail afterwards, testified at the arbitration:

Q: And you were aware that there was a furlough at that time?

A: Yes.

Q: Do you know what happened to the jobs? Why was there a furlough at that time, do you know?

A: There was a decrease in the passenger service, I believe.[26]

No Claimant put forth any evidence to rebut this, Claimants' own, testimony that their job loss was caused not by the merger but by the decline in passenger service at the CUT. Indeed, the only other evidence put forth on this issue was through the nearly seventy pages of testimony given at the arbitration by railroad expert witness Michael Weinman, testimony which Claimants also failed to rebut. Mr. Weinman testified extensively, for over three hours, on the dramatic decline in passenger service at the CUT and that it provided the sole reason that each Claimant was furloughed or otherwise adversely affected in his employment. As Mr. Weinman testified, the decline in passenger service at the CUT – which negatively impacted all aspects of passenger train operations at the CUT between 1949-1971 – began before, and continued after, the merger:

Q: Prior to the merger, was the passenger service declining nationally?

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[24] Appendix Vol. 1 at Appendix-0379. (p. 35, ln. 7 - p. 36, ln. 10).
[25] Appendix Vol. 1 at Appendix-0381. (p. 15, ln. 3-6).
[26] Appendix Vol. 5 at Appendix-2864-65. (p. 108, ln. 25 - p. 109, ln. 7).

A: Yes, it was.

Q: Prior to the merger, was the passenger service declining for the New York Central and Pennsylvania Railroads?

A: Yes, it was.

* * *

Q: Did that decline continue after the merger?

A: Yes, it did.[27]

Mr. Weinman's testimony traces the severe decline in national passenger traffic prior and subsequent to 1968, the effects of which were felt in passenger yards across the nation, particularly the CUT. As Mr. Weinman further testified, all aspects of passenger train operations declined substantially at the CUT between 1949-1971. The yearly aggregate of trains using the CUT diminished from 35 to 11 in the ten years between 1961 and 1971.[28] The number of passenger cars decreased even more drastically – from 231,936 to zero – over the same period.[29] Mr. Weinman also testified to the corresponding decline in labor needs at the CUT during the late 1960s, the exact period when these Claimants assert they were adversely affected because of the merger. The number of CUT employees diminished proportionately to the number of trains and passenger cars at the CUT.[30] In 1961, the CUT had just over 550 employees.[31] By 1971, approximately 60 employees were needed to provide services.[32] When asked about the correlation between the decline in passenger service and that of the labor force at the CUT in the late 1960's, Mr. Weinman unequivocally testified:

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[27] Appendix Vol. 5 at Appendix-3020. (p. 536, ln. 18 - p. 537, ln. 16).
[28] Arbitration Transcript, Appendix Vol. 5 at Appendix-3018. (p. 529, ln. 15-17).
[29] Arbitration Transcript, Appendix Vol. 5 at Appendix-3020. (p. 536, ln. 1-5).
[30] Arbitration Transcript, Appendix Vol. 5 at Appendix-3019. (p. 533, ln. 6-14).
[31] Appendix Vol. 1 at Appendix-0216.
[32] *Id.*

> The labor force at CUT reacted to the decline in passenger service because the management reacted to it by discontinuing jobs, discontinuing assignments and reducing the resources applied to that commensurate with the decline in passengers and the revenue therefrom. It was a case that affected virtually every craft at Cleveland Union Terminal. **Every craft lost job opportunities as a result of the diminution of the passenger service through CUT.**[33]

Clearly, as Mr. Weinman substantiates, the decline in rail passenger traffic that continued into the late 1960s and early 1970s resulted in the need to reduce the number of brakemen, carmen, and rate clerks needed at the CUT, which were the positions held by Claimants.[34] Fewer employees were needed at the CUT, not because of the merger, but simply because of the ever-decreasing amount of passenger traffic flowing through the CUT at that time. By 1968, when many of these Claimants were furloughed or claim to have been adversely affected, there were only 11 trains per year at the CUT.[35] Between 1945 and 1960, NYC lost over $500 million in passenger operations, and this dramatic decline continued into the late 1960s, thereby creating the need for a national passenger rail carrier, Amtrak. Hence, the clear, unrebutted and overwhelming evidence in the record establishes that any adverse affect experienced by Claimants was caused solely by the decline in passenger traffic, a cause completely unrelated to the merger.

The merger, Mr. Weinman testified, had no effect on passenger traffic at the CUT because the Pennsylvania Railroad had no passenger traffic at the CUT. Thus, Claimants (former New York Central employees) were not displaced by any Pennsylvania Railroad employees as a result of the merger. This significant fact, as it relates to causation, went unrebutted by the Claimants and was ignored by the Split Panel in its 181-page decision.

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[33] Appendix Vol. 5 at Appendix-3021. (p. 540, ln. 14-24)
[34] Appendix Vol. 5 at Appendix-3021. (p. 540, ln. 25 - p. 541, ln. 8).
[35] Appendix Vol. 1 at Appendix-0029.

According to Mr. Weinman, "[t]he merger had almost no effect on the CUT . . . there would have been no effect of the merger itself on the Cleveland Union Terminal."[36]

All of Mr. Weinman's testimony and evidentiary support for his conclusions went without rebuttal by Claimants at the arbitration and, as such, was the only evidence on causation before the Split Panel. Indeed, the Split Panel even agreed with Mr. Weinman's findings related to the decline in passenger service and its impact on the CUT and stated that "[t]here is little doubt that the fundamental cause of the loss of employment for railroad employees working on passenger service at the CUT and elsewhere was the decline in intercity railroad passenger service in the quarter century following World War II."[37] However, even in the face of this overwhelming and unrebutted evidence and in direct contradiction to its own factual findings regarding the decline in railroad passenger service, the Split Panel found – without any evidentiary basis in the record – that the decline in rail passenger service "led to (or even caused) the merger" but "it was the implementation of the merger that led to the coordinations that deprived the claimants and other railroad employees of employment."[38] This "fact" – that the decline in rail passenger service led to (or even caused) the merger – is simply made up by Chairman Steinglass. Claimants neither advanced this argument nor put on any evidence to support it. There is not one shred of evidence to support this conclusion by Chairman Steinglass.

Not only is there no evidence in the record to support this "fact" (decline in passenger trains led to the merger and the implementation of the merger deprived railroad employees of jobs) that Chairman Steinglass made up, the only evidence in the record contradicts it. For instance, even the Claimants' own testimony and that of railroad expert Michael Weinman

[36] Appendix Vol. 5 at Appendix-3020. (p. 53,7 ln. 25 - p. 538, ln. 11)
[37] Arbitration Award, p. 62 (Appendix Vol. 5 at Appendix-2684).
[38] Arbitration Award, p. 63 (Appendix Vol. 5 at Appendix-2685).

conclusively demonstrate that the rail passenger service was declining – resulting in job loss – long before the merger even took place. Claimant Gallagher, at his deposition, testified:

> Q: During your employment at the CUT, was there a decline in passenger service?
>
> A: I would say yes.
>
> * * *
>
> Q: Did that decline begin in the 1950s?
>
> A: I would say so, yeah.
>
> Q: Did that decline continue into the 1960s?
>
> A: Yeah, I would say so. That's when they have a decline in business, you have furloughs.
>
> Q: Okay. So the decline in passenger business resulted in less and less passenger cars coming through the CUT?
>
> A: Yes.[39]

Claimant McNeely, at his deposition, also testified:

> Q: And did you work your entire career at the Cleveland Union Terminal?
>
> A: No. Folded up in '67 [one year before the merger], the end of passenger trains.[40]

At the arbitration, Mr. Weinman also testified to the rail passenger service decline that began long before the merger took place:

> Q: Prior to the merger, was the passenger service declining nationally?
>
> A: Yes, it was.
>
> Q: Prior to the merger, was the passenger service declining for the New York Central and Pennsylvania Railroads?
>
> A: Yes, it was.

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[39] Appendix Vol. I at Appendix-0379. (p. 35, ln. 7 - p. 36, ln. 3).
[40] Appendix Vol. I at Appendix-0381. (p. 15, ln. 3-6)

* * *

Q: Did that decline continue after the merger?

A: Yes, it did.[41]

Thus, by the time the merger took place in 1968 – when the Claimants were furloughed – there were no jobs left for consolidation due to the severe decline in rail passenger traffic through the CUT that occurred long before the merger. Indeed, Mr. Weinman further demonstrated at the arbitration that because the Pennsylvania Railroad (one of the merging companies) discontinued its passenger service well before 1968, that the CUT would not have been effected at all by the merger – causing job loss—because there were no positions to consolidate, i.e. no Pennsylvania passenger service employee would have displaced any of the Claimants who were New York Central passenger service employees. Mr. Weinman testified:

Q: What was the result of that decline in passenger service to the CUT after the merger?

A: It continued the needs of the railways to maintain a facility at the CUT and all that was incident to it.

Q: So the merger didn't really affect the CUT?

A: The merger had almost no effect on the CUT . . . The Pennsylvania Railroad's passenger service to Cleveland ended approximately 1965. . ..

Q: Was there a consolidation of passenger terminals between New York Central and the Pennsylvania Railroad at the CUT after the merger?

A: No. There would have been no reason to consolidate because the Pennsylvania had no presence whatsoever of any passenger trains in Cleveland.[42]

Clearly then, no Pennsylvania Railroad employee ever displaced any New York Central employee, which further substantiates Mr. Weinman's testimony that "[t]he merger had almost

[41] Appendix Vol. 5 at Appendix-3020. (p. 536, ln. 18 - p. 537, ln. 16).
[42] Appendix Vol. 5 at Appendix-3020. (p. 537, ln. 17 - p. 539, ln. 13).

no effect on the CUT"[43] and that "there would have been no effect of the merger itself on the Cleveland Union Terminal." Had the Claimants ever been displaced by a Pennsylvania Railroad employee they surely would have come forth at the arbitration with such evidence. They did not, however, because the record clearly shows that this sort of consolidation never took place at the CUT.

The Split Panel's decision completely disregards the unrebutted testimony put forth by Mr. Weinman and the Claimants themselves – the only evidence of causation in the record – that conclusively proves: (1) the decline in rail passenger traffic that began long before the merger was the cause of the Claimants' job losses; (2) the Pennsylvania Railroad discontinued its passenger service through Cleveland long before the merger took place, so that there was no consolidation of jobs; and (3) based on the foregoing, the Claimants could not show the merger caused their job loss because none of them were ever displaced by a Pennsylvania Railroad employee. The Split Panel's decision ignores this dispositive and unrebutted evidence, and it is this type of "irrational" decision-making that constitutes egregious error that the *Lace Curtain* standard was designed to protect against. *Augustus*, 2000 U.S. App. LEXIS 33966 at *10. On this basis alone, the Board must overturn the decision reached by the Split Panel.

II. In Deciding the Second Issue, The Split Panel Committed Egregious Error by Improperly Shifting the Claimant's Burden of Proving Compliance with Work-Related Requirements – Or Conditions Precedent – For Receiving Benefits Under the MPA to Penn Central

The Claimants allege that Penn Central breached the terms of the MPA, a collective bargaining agreement, by depriving them of compensation provided for therein. It is well-established law that the party who alleges that there has been a breach of a collective bargaining agreement bears the "whole burden of proof" on the issue. *International Brotherhood of*

[43] Appendix Vol. 5 at Appendix-3020. (p. 537, ln. 25).

Electrical Workers Local No. 683 Pension Trust v. Advantage Enterprises, Inc., 813 F. Supp. 592, 598 (S.D. Ohio 1993). As such, and as a condition precedent to entitlement to benefits provided for in the MPA, the Claimants were required to prove that they exercised their seniority rights to the fullest extent and reported to work as required by the applicable agreements ("work-related requirements" as the Split Panel refers to them in their decision). A condition precedent is "the **performance of some act**, after the terms of the contract have been agreed on, before the contract shall be binding on the parties." *Plazzo v. Nationwide Mutual Insurance Co.*, 1996 Ohio App. LEXIS 476, *9 (9th App. Dist. 1996) (quoting *Mumaw v. Western & Southern Life Ins. Co.*, 97 Ohio St. 1, 9 (1917)) (emphasis added).

The MPA and the Sixth Circuit in *Augustus* explicitly set forth the Claimants' obligations (or "performance" which must have occurred) for proving entitlement to MPA benefits. For the *Sophner*, *Watjen*, and *Bundy* Claimants, §1(b) of the MPA provides the conditions precedent to entitlement to benefits by stating that "[a]n employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation, rules, working condition . . . or rights and privileges pertaining thereto in case of his . . . failure to obtain a position available to him in the exercise of his seniority rights." As for the *Knapik* Claimants – who were furloughed at a different time than the rest of the Claimants – the Sixth Circuit set forth the condition precedent to recovery under the MPA in *Augustus* by holding that they were required to show they reported for work by "immediately" contacting the yardmaster and their failure to do so "precluded their recovery under the MPA."[44] Thus, all of the Claimants – as the

[44] *Augustus* at *14, * 16, Appendix Vol. 1 at Appendix-0412-13.

parties alleging a breach of the MPA – were required, as a matter of law, to carry the whole burden of proof in establishing entitlement to benefits under the MPA.[45]

However, disregarding the above straightforward black letter law, the Split Panel improperly shifted the burden of proof on Penn Central and held that "Penn Central has the **burden of proving non-compliance** with the variously-defined work requirements (or other supervening causes for the employment losses)"[46] for each of the Claimants in *Knapik*, *Sophner*, *Watjen* and *Bundy*. This holding defies not only the applicable law in Ohio but in every other jurisdiction in the country, and constitutes egregious error under the *Lace Curtain* standard. For example, when addressing the *Sophner* Claimants' proof of their work-related requirements (or conditions precedent) for benefits under the MPA, the Split Panel stated that each claimant "did not point to specific evidence in the record that establishes that they exercised their seniority rights to obtain all available work during months in which they were working for Penn Central but for which they claim displacement allowances."[47] However, because the *Sophner* Claimants failed to put forth any evidence that they met the work-related requirements, the Split Panel shifted the burden onto Penn Central:

> Thus, in light of Penn Central's failure to present evidence that the *Sophner* claimants failed to exercise seniority rights to obtain all available work in months for which they are claiming displacement allowances, we conclude that the *Sophner* claimants met the work-related/seniority eligibility requirement of the MPA (or, perhaps more accurately, are not ineligible because of an alleged failure to

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[45] Also see *McReynolds v. Am. Progressive Corp.*, 1991 Tenn App. LEXIS 136, *13 (March 1, 1991)("The Plaintiff overlooks the fact, however, that the defendants did not carry the burden of proving that the condition precedent did not occur. The plaintiff must prove that the condition precedent was satisfied in order to establish that the defendant's liability was triggered under the contract."); *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 587 F.2d 813, 823 (6th Cir. 1978)(applying Ohio law)("Moreover, inasmuch as section 2-607 operates as a condition precedent to any recovery, the burden of proof is on the plaintiff to show that notice was given within a reasonable time."); and *Raymond v Marks*, 1997 U.S. App. LEXIS 15246, *3 (2nd Cir. 1997)(applying New York law)("Where there is a condition precedent to performance, the party seeking to enforce the contractual obligation bears the burden of proof.")

[46] Appendix Vol. 5 at Appendix-2675. (emphasis added).

[47] Arbitration Award, p. 80 (Appendix Vol. 5 at Appendix-2702).

> prove that they exercised their seniority rights to all available positions).[48]

Had the Split Panel followed the applicable black letter law and required the *Sophner* Claimants to carry their burden of proving compliance with their work-related requirements, their claims would have been rejected out of hand for a complete lack of evidence.

The Split Panel's holding in regard to the *Knapik*, *Watjen*, and *Bundy* Claimants' burden of proving compliance with work-related requirements is just as egregious but requires a more in-depth analysis. Because even if Penn Central had the burden of proving non-compliance with the work-related requirements, the evidence clearly demonstrates that the *Knapik*, *Watjen*, and *Bundy* Claimants did not meet the conditions precedent to receiving benefits under the MPA.

A. *Knapik* Claimants Concede That They Did Not Report to Work After the February 21st Furlough Notice – A Condition Precedent to Entitlement to Benefits Under the MPA – And Are Barred By the Sixth Circuit's Decision in *Augustus*

The Sixth Circuit has already interpreted the MPA, so that the Split Panel was required to apply this controlling law to the *Knapik* Claimants. In *Augustus*, the Court was specific as to when and how trainmen like the *Knapik* Claimants (i.e., claimants who received furlough notices on February 21, 1968) were obligated to report to work:

> On February 21, 1968, Petitioners and other CUT employees were furloughed from their CUT jobs as part of a reduction in force on the CUT, effective February 25, 1968. The furlough notice told the CUT employees to "**immediately contact**" the N.Y. Central yardmaster for work in the freight yard, pursuant to the Top and Bottom Agreement.[49]

The Sixth Circuit held that failure to comply with this obligation precludes any recovery under the MPA:

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[48] Arbitration Award, p. 81 (Appendix Vol. 5 at Appendix-2703).
[49] *Augustus* at *3-4 (emphasis added), Appendix Vol. 1 at Appendix-0410.

> The arbitration panel's ruling – that Petitioners' **failure to report to work precluded their recovery** under the MPA – was based upon the express terms of the MPA . . . As the arbitration panel observed, section 1(b) of the MPA expressly required covered employees to accept available work in order to qualify for benefits . . . **refusal to report to work was at their own peril** . . .[50]

It is thus clear that the MPA, as definitively interpreted by the Sixth Circuit, required the *Knapik* Claimants to report to work by "immediately" contacting the yardmaster at the freight yard within 15 days (a requirement imposed by the Top and Bottom Agreement) of the February 21 furlough notice or they were precluded from any recovery under the MPA. In the record before the Split Panel, it was undisputed that each of the *Knapik* Claimants failed to report for work at the freight yard within the time limit, and therefore, their claims should have been categorically denied. In its decision, while recognizing that it is "bound by the Sixth Circuit decision in *Augustus*,"[51] the Split Panel proceeds to insert words and alternative meaning into the Sixth Circuit's holding. The Split Panel declares that the *Knapik* Claimants' failure to "immediately contact the NY Central yardmaster"-- as required by the Sixth Circuit and the MPA -- does not act as a bar to their claims because the *Knapik* Claimants should have been given a second chance to report. Indeed, the Split Panel finds that Penn Central's failure to give the *Knapik* Claimants a second chance is "untenable."[52] Contrary to the Split Panel's interpretation, though, "second chances" are not provided for in the Sixth Circuit's straightforward holding "that petitioners' failure to report to work (by "immediately" contacting the NY Central yardmaster) precluded their recovery under the MPA."[53] This holding is straightforward and mandatory. Even the Split Panel's illusory interpretation cannot avoid the preclusive effect the holding has on the *Knapik* Claimants' failure to report to work.

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[50] *Augustus.* at *14 (Appendix Vol. 1 at Appendix-0412), * 16 (Appendix-0413) (emphasis added).
[51] Appendix Vol. 5 at Appendix-2698.
[52] Appendix Vol. 5 at Appendix-2700.
[53] *Augustus* at *14 (Appendix Vol. 1 at Appendix-0412).

Prior to, and throughout the course of, the arbitration, the Claimants also sought to avoid the binding precedent in *Augustus* by asserting a very disingenuous and misleading argument to the Split Panel in their Post-Arbitration Brief.[54] The Claimants sought to convince the Split Panel that the *Knapik* Claimants all "reported to work" as required by the Sixth Circuit because they all eventually "accepted recall to work." This argument is wrong and misleading. "Reporting to work" and "accepting recall" to work are two separate and distinct concepts. Claimants' attempted slight of hand was exposed by their own witnesses. Claimants' witness, Mr. Knapik, testified at the arbitration:

> Q. Can you tell us the distinction between reporting for work and accepting recall?
>
> A. When you report for work, you are telling the crew dispatcher that you are available.
>
> * * *
>
> Q. What does reporting for work mean?
>
> A. That you're available for work. That you will work.
>
> * * *
>
> Q. And when there is a recall to work, that would come in the -- how would recalls happen?
>
> A. It would have to be – started [sic, stated] that they were needed by either the general yard master or labor relations that people were needed. And they would then look at the furloughed people and tell the furloughed people that they're recalled to -- recalled for active duty.[55]

Of course, as a result of attrition, all of the *Knapik* Claimants were eventually "recalled to work" many months and in some cases years after the February 21, 1968 furlough notice. That notice, as the Sixth Circuit explained, affirmatively required them to "report to work" by

[54] Appendix Vol. 5 at Appendix-3218-19.
[55] Appendix Vol. 5 at Appendix-2864. (p. 105, ln. 4 - p. 106, ln. 11).

immediately contacting the NYC yardmaster **within 15 days** of the February 25 effective date of the furlough notice or they were barred from benefits under the MPA. And while the Split Panel arbitrarily dismisses this important distinction in a footnote in their decision,[56] four pages later they make reference to the "eventually-reporting *Knapik* claimants,"[57] which completely disregards the earlier testimony demonstrating the difference between "reporting to work" and "accepting recall" or "eventually reporting." Thus, by ignoring the distinction of "immediately" reporting to work (as required by *Augustus*) and "eventually accepting recall," the Split Panel buys into the Claimants' misleading argument. In light of the *Knapik* Claimants' obligation to "immediately" report to work under *Augustus*, it is irrelevant that many of the *Knapik* Claimants "eventually" were recalled. And while shifting the burden of proof on this issue to Penn Central is egregious error in and of itself, the Split Panel's failure to follow the Sixth Circuit's decision in *Augustus* – which it acknowledged is binding – defies reason and warrants reversal.

B. The *Watjen* and *Bundy* Claimants Were Not Deprived of Employment – A Condition Precedent to Benefits under the MPA – Because They Quit Their Full-Time Jobs as Utility Employees

The Claimants in *Watjen* and *Bundy* held clerical positions at the CUT, and allege that they were deprived of employment with Penn Central, and seek entitlement to lump sum separation allowances, which is an alternative to receiving a coordination allowance under the existing agreements. However, these Claimants were **never deprived** of employment by Penn Central. When their rate clerk positions were abolished in 1969 – almost a year after the merger – the Claimants were given full-time jobs as utility employees. Each of the Claimants accepted, and subsequently *quit*, their jobs as utility employees and are thereby disqualified from receiving benefits under both the WJPA and the MPA. However, in finding that these Claimants are

[56] Appendix Vol. 5 at Appendix-2696.
[57] Appendix Vol. 5 at Appendix-2700.

entitled to lump sum separation allowances, the Split Panel disregards one critical and dispositive fact which acts as a total bar to benefits: each Claimant **quit** the position of utility employee that he was offered, and subsequently accepted. The Split Panel instead finds that because these Claimants allegedly "attempted to exercise their seniority rights"[58] to positions other than utility employee that they should not have been denied eligibility to lump sum separation allowances. This reasoning misinterprets the requirements under the WJPA for proving entitlement to lump sum separation allowances, and ignores the fact that the Claimants voluntarily quit their positions as utility employees – a disqualifying factor under the terms of the WJPA and MPA because they were never deprived of employment by Penn Central.

Entitlement to a lump sum separation allowance is contingent upon an employee's eligibility to receive a coordination allowance as articulated in the WJPA.[59] Section 7(a) of the WJPA states that "[a]ny employee of any of the carriers participating in a particular coordination who is *deprived of employment* as a result of said coordination shall be accorded an allowance (hereinafter termed a coordination allowance), based on length of service."[60] Section 7(c) of the WJPA qualifies the scope of eligibility by stating that "[a]n employee shall be regarded as deprived of his employment and entitled to a coordination allowance . . . when the position which he holds on his home road is abolished as a result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation."[61] This language is clear. In order to become eligible for a coordination allowance, the employee must meet the following criteria: 1) be deprived of employment, 2) the deprivation of employment must be as a result of the merger, and 3) the

[58] Appendix Vol. 5 at Appendix-2708.
[59] Appendix Vol. 1 at Appendix-0464.
[60] Appendix Vol. 1 at Appendix-0466 (emphasis added).
[61] Appendix Vol. 1 at Appendix-0466.

employee must be unable to obtain a position anywhere within the merged company. Further, Section 9 of the WJPA states that "any employee *eligible to receive a coordination allowance* under section 7 hereof, may, at his option at the time of coordination, resign and accept in a lump sum a separation allowance."[62] Therefore, an employee must be "eligible to receive a coordination allowance" in order to be entitled to the option of receiving a lump sum separation allowance. Thus, to be eligible to receive a coordination allowance, a Claimant must prove he was deprived of employment as a result of the merger and that he was unable to obtain a position within the merged company, Penn Central.

The Claimants in *Watjen* and *Bundy* claim entitlement to lump sum separation allowances,[63] but failed to prove they qualify for any such payment under the explicit terms of the WJPA. Section 7(a) of the WJPA cannot be read in a vacuum devoid of the qualifications Section 7(c) imposes upon it. These Claimants were given the option of, and accepted, full-time positions as utility employees with Penn Central.[64] Each Claimant accepted such position and eventually quit,[65] which disqualifies them from receiving a separation allowance. The position of utility employee was "a position in the coordinated operation" and the Claimants' decision to resign rather than continue in their new position precludes their recovery under the MPA.

The Split Panel bases its finding for the *Watjen* and *Bundy* Claimants on an obvious misinterpretation of §7(c) of the WJPA which states: "[a]n employee shall be regarded as deprived of his employment and entitled to a coordination allowance ..... when the position which he holds on his home road is abolished as a result of coordination and he is unable to

[62] Appendix Vol. 1 at Appendix-0467 (emphasis added).
[63] Damage calculations submitted by Drs. Rosen and Burke, Appendix Vol. 2 at Appendix-1178-1264.
[64] Appendix Vol. 1 at Appendix-0387.
[65] Claimants' Trial Brief, Appendix Vol. 5 at Appendix-3121.

obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation."[66] The Split Panel erroneously believes that the phrase "by the exercise of his seniority rights" applies to both obtaining a position "on his home road" and to – more generally – "a position in the coordinated operation."[67] In other words, the Split Panel finds, even though each of the Claimants was offered a job as a utility employee (clearly "a position in the coordinated operation"), that because each Claimant did not have to "exercise his seniority rights" to the position, they are somehow entitled to lump sum separation allowances. This is simply wrong. First, the phrase "by the exercise of his seniority rights" only applies to positions "on [their] home road" as that is the only place that the Claimants would even have seniority rights. Thus, this phrase is not applicable to every other "position in the coordinated operation" such as that of utility employee. And second, it is completely irrelevant whether or not the position of utility employee required an "exercise of seniority" because it was "a position in the coordinated operation," which is what the WJPA required Penn Central to offer each of the Claimants, and Penn Central did so. The Claimants were never deprived of employment with Penn Central, but were simply given different, yet equivalent, jobs as utility employees. Claimant Franz, in his dialogue with Chairman Steinglass during the arbitration, admitted that the position of utility employee was a full-time job, and that he received forty hours a week.[68] Furthermore, the position of utility employee carried the same rate of pay as the Claimants' rate clerk positions.[69] The only evidence of record is that these Claimants received full-time jobs with comparable pay with Penn Central, and there is no evidence that any of these Claimants were ever deprived of employment within the meaning of the WJPA or MPA.

[66] Appendix Vol. 1 at Appendix-0466.
[67] Appendix Vol. 5 at Appendix-2707.
[68] Appendix 2900 – Vol. 5. (pg. 249 ln. 19 - pg. 250 ln. 11)
[69] Arbitration Transcript, Appendix Vol. 5 at Appendix-2897. (p. 239, ln. 19 - p. 240, ln. 17).

No matter how the Split Panel attempts to spins it, the evidence demonstrates that the Claimants in *Watjen* and *Bundy* were not deprived of employment because they were given full-time jobs as utility employees when their rate clerk positions were abolished. Their act of quitting these positions disqualified them from benefits under both the MPA and WJPA. The Split Panel's holding ignores and disregards the requirements of both the MPA and WJPA, and thus fails to "draw its essence from the labor protective conditions" contained therein under the *Lace Curtain* standard requiring that its decision be reversed.

III. In Deciding the Third Issue, The Split Panel's Decision Fails to Draw Its Essence From the Protective Labor Conditions Because the Split Panel Awarded Damages Based on Dr. Harvey Rosen's Computation of Damages That, Even Dr. Rosen Admits, Contradicts and Ignores the Required Damage Calculation Contained in the MPA

In his 1976 ruling, Judge Lambros ordered that "the plaintiffs now must come forward with **evidence** to support the position that there was **compensation loss** to which they are entitled to payment."[70] The MPA and the incorporated WJPA **provide the only method** for calculating compensation loss. Thus, in order to recover, the Claimants are required to first prove actual compensation loss in accordance with the required terms of the MPA and WJPA. However, the Claimants' expert Dr. Rosen and his firm Burke, Rosen & Associates – hired by the Claimants to make these calculations – admittedly did not follow the formula required by the MPA. Even though Dr. Rosen agreed on direct and cross examination that he did not properly calculate damages in accordance with the MPA, the Split Panel uncritically adopted his "deviations" from the MPA and awarded unproven damages.[71]

[70] Appendix Vol. 2 at Appendix-0710. (emphasis added)
[71] Appendix Vol. 5 at Appendix-2728.

A. Dr. Rosen Failed to Use The Proper Formula for Calculating Damages Under the MPA and the Split Panel Summarily Adopts His Calculations

The MPA[72] sets forth the formula for determining what amount of compensation is owed, if any, using Section 6(c) of the WJPA, which states:

> Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference . . .[73]

In his report, Dr. Rosen correctly cites Section 6(c) of the WJPA as defining the displacement allowance by stating "if [an employee's] compensation in his current position is less in any month in **which he performs work** than the aforesaid average compensation he shall be paid the difference . . . "[74] In his testimony at the arbitration, Dr. Rosen acknowledged that Section 6(c) contains the proper formula for displacement allowances:

> Q: And specifically, your report is – here you cited this language "if his compensation in his current position is less than any amount [*sic* month] in which he performed work, then the aforesaid average compensation, he shall be paid the difference."
>
> A: Yes.

[72] Appendix E of the MPA (Appendix Vol. 1 at Appendix-0471) requires displacement allowances to be calculated in accordance with the WJPA by stating: "Employees not entitled to preservation of employment but entitled to the benefits of the Washington Job Protection Agreement pursuant to the provisions of Section 1(a) of the Protective Agreement shall be entitled to compensation in accordance with the provisions of the Washington Job Protection Agreement."

[73] Appendix Vol. 1 at Appendix-0465.

[74] Appendix Vol. 2 at Appendix-1261-62. (emphasis added)

Q: All right. And that's generally what's known as the displacement allowance, correct?

A: That's my understanding, yes.

* * *

Q: Now, I think we all agree, and you agreed a little bit earlier, that Section C tells us how to calculate the displacement allowance; isn't that right?

A: Section C outlines a formula on page 10. That's correct.[75]

Even though he had cited Section 6(c) as the correct formula in his report, directly quoting Section 6(c), and conceded in his testimony that Section 6(c) defines the "formula" for calculating the displacement allowance, Dr. Rosen failed to follow Section 6(c) because it would have provided a dramatically less desirable result for the Claimants. Instead of following the required, straightforward steps in Section 6(c) to calculate displacement allowances, Dr. Rosen invented a new formula out of whole cloth. When confronted with the fact that he was not following the requirements of Section 6(c), Dr. Rosen -- as experts often do when caught stretching the truth -- made up an excuse. He said that Appendix E of the MPA expressly permitted him to deviate from Section 6(c).[76] Never before cross-examination at the arbitration had Dr. Rosen or the Claimants so much as mention Appendix E or suggest that it had any relevance to the computation of compensation loss.

Appendix E, of course, totally contradicts the maneuvering of Dr. Rosen. Appendix E expressly states that benefits are to be calculated in accordance with the WJPA. The final paragraph of Appendix E reads:

> Employees not entitled to preservation of employment but entitled to the benefits of the Washington Job Protection Agreement pursuant to the provisions of Section 1(a) of the Protective

[75] Appendix Vol. 5 at Appendix-2995. (p. 438, ln. 1-11 and p. 440, ln. 22 - p. 441, ln. 2).
[76] Appendix Vol. 5 at Appendix-3003-05.

> Agreement shall be entitled to compensation **computed in accordance with the provisions of said Washington Job Protection Agreement.**[77]

All of the puffing from Dr. Rosen that Appendix E of the MPA takes precedence over Section 6(c) of the WJPA was pure misdirection designed to spin the Split Panel away from a critical and dispositive truth. That truth is Claimants failed to meet their burden of proving they suffered compensation loss as required by Section 6(c) of the WJPA.

The Split Panel adopts Dr. Rosen's Appendix E fallacy and finds that, because the Claimants are seeking claims under 1(b) of the MPA (which the Split Panel claims are governed by Appendix E) as opposed to 1(a) claims of the MPA (which the Split Panel claims are governed under Section 6(c) of the WJPA), the use of Appendix E was appropriate.[78] Nowhere, of course, does the MPA make a distinction between "1(a)" and "1(b)" claims. The Claimants themselves, in their Complaints, make no reference to bringing actions under section "1(a)" or "1(b)." Quite to the contrary, Claimants concede in their Complaints that their alleged damages should be calculated under the WJPA, not 1(b) or Appendix E of the MPA. The *Knapik* Complaint pleads:

> all provisions of the Washington Job Agreement -- shall be applied for the protection of all employees -- who may be adversely affected with respect to their compensation . . . The Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to 'any employee of any of the carriers participating in a particular coordination who is deprived as a result of said coordination . . .'[79]

The *Sophner* Complaint pleads:

> The Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to any 'employee of

[77] Appendix Vol. 1 at Appendix-0471. (emphasis added).
[78] Appendix Vol. 5 at Appendix-2710-11.
[79] Appendix Vol. 5 at Appendix-3489.

> any of the carriers participating in a particular coordination who is deprived as a result of said coordination...'[80]

The *Watjen* Complaint pleads:

> The Agreement of May, 1936, Washington, D.C. [the Washington Job Agreement], Appendix A (part of the Labor Agreement) makes provision for 'coordination allowance' in the event an employee is 'deprived of employment' and 'separation allowances' for those employees separated or terminated.[81]

The Claimants concede, therefore, that any damages they could recover under the MPA would have to be calculated in accordance with the WJPA. Both the Claimants and the Split Panel are bound by these pleadings. There is no pleading for recovery under Appendix E of the MPA, only recovery under Appendix A of the MPA -- the WJPA.

In further support of its finding, which is also contradicted by the plain language of the MPA, the Split Panel claims that MPA Section 1(a) claims can be brought under the WJPA by "all employees," but that a different set of employees -- separate and distinct from "all employees" -- has a different claim under MPA Section 1(b). According to the Split Panel, this distinct and separate set of employees with different claims is called "present employees," and it is their status as "present employees" that allows the Claimants to bring their "1(b) claims."[82] These distinctions unravel because there is no difference in the MPA between "all employees" and "present employees." Section 1(a) defines "all employees" as:

> All employees of Pennsylvania and Central as of the effective date of this agreement or subsequent thereto up to and including the date the merger is consummated . . .[83]

Section 1(b) defines "present employees" as:

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[80] Appendix Vol. 5 at Appendix-3493.
[81] Appendix Vol. 5 at Appendix-3500.
[82] Appendix Vol. 5 at Appendix-2710-11.
[83] Appendix Vol. 1 at Appendix-0459.

> For purposes of this Agreement the term "present employes" is defined to mean all employes of Pennsylvania or Central who render any compensated service between the effective date of this Agreement and the date the merger is consummated (both dates inclusive)...[84]

It is clear from this comparison that "all employees" and "present employees" are the same. There is no distinction between them and no distinction between "1(a)" and "1(b)" claims. Furthermore, a reading of Appendix E clearly demonstrates that its language is only applicable to determining the Claimants' **status** and not the amount of their benefits. Appendix E is only utilized "[f]or purposes of determining whether, or to what extent, such an employee has been placed in a worse position with respect to his compensation," and enables the decision maker to make such a determination, but does not provide a measure of compensation. The Split Panel's misinterpretation is yet another example of how it re-wrote the MPA so that an award to the Claimants could be made.

The language in Appendix E is clear and unambiguous. Displacement allowances are to be calculated in accordance with the WJPA. The Split Panel's decision, which disregards Section 6(c) of the WJPA and follows Dr. Rosen's retreat to Appendix E, ignores the imposed labor conditions, violates the terms of both the MPA and WJPA, and mandates reversal.

B. Dr. Rosen Failed to Properly Apply the Required Formula Contained in Section 6(c) of the WJPA and Did Not Use the Required Monthly Wage Data in His Calculations

Section 6(c) provides a direct, straightforward formula to calculate entitlement to a displacement allowance. The six-step calculation required Dr. Rosen simply do the following: 1) determine the Claimant's date of displacement; 2) determine the Claimant's compensation and hours worked in the twelve months preceding the date of displacement; 3) divide, separately, the

[84] Appendix Vol. 1 at Appendix-0460.

total compensation and total time paid by twelve to obtain the average monthly compensation and average monthly time paid, which are the minimum amounts used to guarantee the displaced employee; 4) make a month by month comparison of the monthly guarantee in relation to the compensation and hours worked in the Claimant's current position; 5) subtract compensation for any time lost due to voluntary absences; and 6) only calculate a displacement allowance for any month in which the Claimant performed compensated service for Penn Central.

As demonstrated on cross examination, though, Dr. Rosen admitted that he failed to do each of the above required steps when calculating displacement allowances. Dr. Rosen testified to the following:

- Failed to follow Step 2: Dr. Rosen did not use the total compensation in the twelve months preceding displacement as the base period salary --

  Q: So you didn't do this calculation. We are only on step two, there are five steps.

  A: For the ten people on the O'Neill list, I did not.

  * * *

  Q: Well for any of the Claimants. You didn't have their hours worked, did you?

  A: I did not.

  Q: You estimated it, correct?

  A: Correct.

  Q: Does it say in here you are supposed to estimate in 6(c)?

  A: No, it doesn't say you are supposed to estimate them.[85]

- Failed to follow Step 3: Dr. Rosen did not divide separately the total compensation and total time paid by twelve to get the average monthly compensation and time paid for --

[85] Appendix Vol. 5 at Appendix-2999. (p. 454, ln. 25 - p. 455, ln. 21).

Q: Let's look at the next step. And the next step is to divide this total wage information separately. So step three is divide income for the last 12 months, right?

A: Yes.

Q: Hours for the last 12 months, and you divide that by 12, correct?

A: Correct.

Q: Did you do that?

A: I couldn't do it. I didn't have the data . . . I could not because I didn't have the monthly data.[86]

- Failed to follow Step 4: Dr. Rosen did not make a month by month comparison of the monthly guarantee to the compensation of the Claimant in his current position --

Q: Step four. There is a monthly basis comparison, right?

A: Yes.

Q: And the displacement allowance is paid based on a disparity each month?

A: Yes.

Q: You didn't do that comparison, did you?

A: I couldn't. You are right.[87]

- Failed to follow Step 5: Dr. Rosen did not subtract compensation for any time lost on account of voluntary absences --

Q: Now, there is a step five. Step five begins right here. Do you see this language?

A: I do.

Q: So "less compensation for any time lost on account of voluntary absences to the extent that he is not available for

[86] Appendix Vol. 5 at Appendix-3000. (p. 456, ln. 15 - p. 457, ln. 13).
[87] Appendix Vol. 5 at Appendix-3000. (p. 458, ln. 9-17).

service equivalent to his average monthly time during the test period." Do you see that?

A: Yes, and I agree with that. There should be a deduction made for any of those offsets that can be proven . . .

Q: All right. So you didn't do that. Step five, you did not do?

A: No, I was only asked to look at guarantee difference.

Q: So counsel only asked you to look at part of the calculations, is that correct?

A: Through step four.[88]

- Failed to follow Step 6: Dr. Rosen completely ignored and directly contradicted the language in Section 6(c) that an employee is entitled to the displacement allowance only "in any month in which he performs work" by calculating a displacement allowance for Claimants in months in which they did not perform any work --

Q: Well there is a step six, too. So step six is what I have in brackets. And that is when you do the month to month comparison, right?

A: Yes.

Q: You only compare to months in which the employee performed work, don't you?

A: Correct.

* * *

Q: So practically speaking, you gave him credit or you gave him a displacement allowance in months in which he did not work, correct?

A: Yes.

Q: All right. But Section C says he only gets the displacements allowance in any month in which he performs work.

A: C does say that.[89]

[88] Appendix Vol. 5 at Appendix-3000. (p. 459, ln. 1-25).

As noted above, Dr. Rosen also failed to use the proper wage information as required by the MPA in determining whether Claimants, in fact, suffered compensation loss. In order to properly apply the contract formula, Dr. Rosen was required to rely on actual monthly wage data for each of the claimants to calculate any compensation loss. Instead, Dr. Rosen relied on unauthenticated, unverified, and overall unreliable sources not permitted by the MPA, and which are not evidence of actual monthly compensation for each Claimant. Rather than obtain the relevant compensation records from Conrail, the Claimants gave Dr. Rosen their Railroad Retirement Board records and Dr. Rosen compared the earnings shown there to a "forecasted wage" formula he derived from third party sources for the corresponding year to determine if a Claimant experienced a loss in that year.[90] However, that a Claimant made less in any year as compared to a generic "forecasted wage" formula –which purports to show what the average carman or trainman made in a given year – is completely irrelevant and not permitted by the MPA, and Dr. Rosen admitted as much on cross examination:

> Q: Would you read that, please?
>
> A: "Summary of covered compensation under the Railroad Retirement Act for each employee evaluated, entitled employment data, maintenance, credible service and earning yearly totals."
>
> Q: Where in Section C or Appendix E or anywhere in the MPA or WJPA does it say to consult that source in calculating the displacement allowance?
>
> A: It doesn't. It says you should consult the monthly records from the railroad for each person's compensation wage rate and time worked.
>
> * * *

[89] Appendix Vol. 5 at Appendix-3001 & 3004. (p. 460, ln. 1-8 and p. 475, ln. 14-22).
[90] Appendix Vol. 5 at Appendix-2984. (p. 393, ln. 2-5).

Q: The next bullet, "wage rates for brakemen UTU, research and statistical department." The agreement does not say that one should consult that document, does it?

A: No.

Q: Same thing with the next bullet point. "Wage rates for carmen." The agreement does not say you should consult that document, does it?

A: It does not.[91]

The Split Panel's award is based entirely upon Dr. Rosen's patently incorrect wage calculations. Not only are Dr. Rosen's calculations improperly inflated for the calculation of any displacement allowance, but also they have absolutely no evidentiary value because they contradict the express requirements of the MPA and WJPA. The agreements explicitly require actual monthly wage information, not "forecasted" wages or Railroad Retirement Board records which do not provide actual monthly wages for each claimant. The Split Panel, as it must, even concedes this point: "Penn Central is correct in pointing out that the MPA (and indeed the WJPA) contemplated the use of monthly data so monthly earnings could be compared to monthly wage guarantees to determine monthly displacement allowances."[92] The Split Panel, however, arbitrarily finds that the use of "forecasted wages" as opposed to the requirement of "actual wages" is proper because "neither the MPA or the WJPA bar the use of such data."[93] Yet, both agreements do "bar the use of such data" by not explicitly providing for them and by requiring the use of actual "monthly earnings" for each Claimant. The Split Panel's interpretation violates black letter contract law that forbids a party from substituting its interpretation or inserting words or terminology to change the plain meaning of the contract. *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 53 (1988) (reiterating that the court's

[91] Appendix Vol. 5 at Appendix-3005. (p. 477, ln. 13 - 25 and p. 478, ln. 19 - p. 479, ln. 3).
[92] Appendix Vol. 5 at Appendix-2724.
[93] Appendix Vol. 5 at Appendix-2728.

duty is to give effect to the words used by the parties, not "to insert words not used"); *Turner v. Langenbrunner*, 2004 Ohio App. LEXIS 2489 at *13 (holding that a court may not make contracts for others and "read into them terms or language not there). The Split Panel also simply discounts the Claimants' duty to maintain their own compensation records, and adopts Dr. Rosen's conjured up formula that is present nowhere in the agreement and that inserts variables barred by the agreement's terms.

The Split Panel repeatedly stated, as another basis for adopting Dr. Rosen's improper calculations, that Penn Central, and not the Claimants, had a legal duty to maintain and provide the monthly wage compensation records for each Claimant. This is incorrect. Legal custody of the personnel and wage records was conveyed by Penn Central to Conrail on April 1, 1976 pursuant to Act of Congress as Penn Central told Claimants through discovery in February 2007.[94] From April 1, 1976, Conrail had legal custody of all Penn Central personnel records and files. All Claimants had to do, at any point during the ensuing thirty plus years, was subpoena them from Conrail pursuant to Civil Rule 45. They never did. And while legal custody of the records was conveyed from Penn Central to Conrail, the records themselves always remained in the same place at the CUT -- the car department, as Claimants testified to at the arbitration.[95] From the time they were created, and even after the conveyance to Conrail, the personnel records remained in the same location – the car department, and are still there today. The Claimants

[94] Defendant's Feb. 2007 Discovery Responses (Appendix Vol. 3 at Appendix-1400-01): On April 1, 1976, pursuant to the Final System Plan formulated by the United States Railway Association ("USRA"), § 743(b) of the Rail Act, and Special Orders issued by the Reorganization Court, PCTC transferred most of its trackage, equipment, real estate and personnel, and other records to Conrail. Personnel and personnel records associated with commercial transportation of goods became employees of Conrail at this time. That same day, Conrail reconveyed title of PCTC's inter-city passenger services to Amtrak. Personnel and personnel records associated with inter-city passenger service became employees of Amtrak at this time. As a result of USRA, Penn Central ceased and no longer existed as an operated railroad as of April 1, 1976

[95] Appendix Vol. 5 at Appendix-2881 (p. 173, lns. 9-16), Appendix-2890 (p. 209, ln. 3 to p. 210, ln. 2), and Appendix-2873 (p. 142, ln. 21 to p. 143, ln. 23).

failed to obtain these records – a failure not attributable to Penn Central – and this failure is not a proper or logical evidentiary basis for adopting Dr. Rosen's flawed damages calculations.

While the Split Panel fully acknowledges that Dr. Rosen "did not follow the specific requirement of the MPA and, where applicable, the WJPA," the Split Panel merely – and without any citation to authority – characterizes Dr. Rosen's failure to follow the required calculations as "deviations" that "are justified in light of the age of these proceedings."[96] Dr. Rosen's complete abrogation of the MPA's mandates can hardly be considered mere "deviations," and the length of these proceedings in no way provide a justifiable basis for allowing these "deviations." The Split Panel's disregard of the terms of the MPA renders their decision reversible under the *Lace Curtain* standard as it fails to draw its essence from the required labor protective conditions contained therein.

IV. The Split Panel's Award of Over $12.5 Million in Prejudgment Interest Is Improper Because an Award of Prejudgment Interest is Not Provided For in the MPA or In the Arbitration Agreement Entered Into Between the Parties

The Split Panel's extreme and unwarranted award of over $12.5 million in prejudgment interest – to "enhance" the $560,000 award of benefits to the Claimants – patently violates the longstanding rule in arbitrations that pre-award interest may not be allowed on a labor claim unless the underlying agreement specifically authorizes such an award. *Cincinnati Public Schools*, 124 LA 143, 149 (2007)[97] ("The Union's claim for pre-award interest on the back pay award is denied. There is no provision in the CBA for an award of pre-award interest. Arbitrators historically have not issued such remedial awards without an expressed contractual authorization."); *Dobson Cellular Systems*, 120 LA 929, 934 (2004)[98] ("However, the Union's request for interest on the back pay award must be denied. Arbitrators traditionally do not award

[96] Appendix Vol. 5 at Appendix-2728.
[97] *See* Appendix Vol. 5 at Appendix-3519.
[98] *See* Appendix Vol. 5 at Appendix-3528.

interest on back pay or other monetary awards where the contract does not provide for payment of interest."); *Grou Cold Storage Inc.*, 119 LA 1464, 1466 (2004)[99] ("At the hearing, the Union also requested pre-award interest on any amounts determined by the Arbitrator to be due and owing to the eight laid off employees. The Arbitrator finds no provision in the collective bargaining agreement that would allow the award of such interest.").

The parties here freely negotiated two separate agreements that established and governed this arbitration. Neither agreement contains any authorization or allowance for pre-award interest. The first agreement – the MPA – was negotiated between sophisticated parties (Penn Central and the unions) with comparable bargaining strength, each side negotiating in its own best interest. Yet these same unions who represented the Claimants did not include any provision in the MPA authorizing an award of interest, even though they negotiated an entire section of the MPA dealing with arbitration procedures specifically to replace the procedures in the WJPA.[100] Likewise, the second agreement -- the Agreement For Arbitration signed in 1979 -- did not include any authorization for an award of interest on any claim.[101] This was the agreement to govern the scope of the arbitration negotiated between the Claimants and Penn Central during the course of the litigation on the very claims that they sought interest on, and it did not include any provision for awarding interest on those claims. Absent such specific authorization in either governing agreement, an award of interest is simply not allowable even if any Claimant was able to prove a compensable loss under the MPA.

Disregarding black letter law, the Split Panel purported to "enhance" its $560,000 total award of benefits with prejudgment interest in excess of $12.5 million, justifying the award not

[99] *See* Appendix Vol. 5 at Appendix-3534.
[100] *See* MPA, p. 5, § 1(e), Appendix Vol. 1 at Appendix-0461 to Appendix-0462.
[101] Appendix Vol. 3 at Appendix-1337-42.

on legal grounds, but by erroneously citing to Penn Central as allegedly chiefly responsible for the delay in this litigation. This argument is not true, as the record clearly reflects, and is certainly not grounds for awarding prejudgment interest in light of the aforementioned precedents. The Split Panel's award can only be characterized as punitive in nature and is simply a means of unjustifiably penalizing Penn Central without any evidentiary basis.

Claimants did not offer one shred of evidence at the arbitration about delay or that any delay was attributable to Penn Central. Yet, the Split Panel, grasping at straws, simply points to proceedings before Judge Oliver in 2005 -- where Penn Central asserted a claim of laches against the Claimants for their six year delay between 1998 and 2004 in failing to re-initiate the arbitration proceedings -- as the sole basis for finding Penn Central responsible for the delay. However, contrary to the Split Panel's finding, Judge Oliver found that **Claimants and Penn Central were equally responsible for the protracted length of these proceedings.** Addressing Penn Central's laches argument, Judge Oliver found that *neither side* had clean hands: "The Court concludes that Defendant does not come with clean hands. In assessing the causes of delay over the past five years, the Court concludes, based on Plaintiffs' letters calling for new mediation panels and a return to arbitration, that **Plaintiffs are no more responsible than Penn Central for delay** . . . Defendant Penn Central seeks an equitable remedy of laches, but it bears **at least as much responsibility as Plaintiffs for the recent delay** in these cases."[102]

Judge Oliver even recognized that the lengthy duration resulted not from improper delay by Penn Central but from the parties exercising their respective rights: "The record shows that the case has been pending before various decision-making tribunals – the two arbitration panels, the Surface Transportation Board, the district court, and the Sixth Circuit – for a substantial

[102] Appendix Vol. 3 at Appendix-1350.

portion of its history . . . Plaintiffs were within their rights to appeal the arbitration findings, and have yet to receive a final ruling on the first case that went to arbitration. Further, Defendant has exercised its appeal rights in this case as well."[103] Yet, the Split Panel stands Judge Oliver's ruling on its head and claims that the phrase "at least as much responsibility as Plaintiffs for the recent delay" means that Penn Central is chiefly responsible for the delay in the case. Judge Oliver did not find Penn Central primarily responsible for delay in this litigation, and neither has any other Judge or Arbitrator to preside over this matter in the forty year history of the case. Rather, as the dissent of the Split Panel rightly recognized, "The Majority's award is the first time that the Claimants have been given monetary relief. In fact, all prior rulings necessitated that the Claimants appeal from either District Court orders or from the decisions of other arbitration panels. Curiously, then, the Majority justifies imposing the burden of prejudgment interest on the Carrier by, in effect, penalizing them for delaying this litigation."[104]

In sum, there is no provision in the agreements governing the arbitration allowing an award of prejudgment interest. Such award was not only impermissible but punitive without any support in the record. To "enhance" the award of benefits by more than 22 times for prejudgment interest was reversible error and cannot stand.

V. The Split Panel's Decision Was Without Basis In Reason or the Factual Record And Is the Clear Result of the Bias of Chairman Steinglass Based on his Personal and Professional Relationship with The Partner of Claimants' Expert Witness.

When the two party arbitrators were unable to agree upon a neutral arbitrator, the District Court directed both Claimants and Penn Central to submit names. Steven Steinglass was on the list submitted by Claimants and was appointed by the Court as the neutral arbitrator and chairman.

[103] Appendix Vol. 3 at Appendix-1351.
[104] Arbitration Award Dissent, p.p. 27-28 (Appendix Vol. 5 at Appendix-2830 to Appendix-2831).

Less than a month and a half before the scheduled arbitration – and over ten weeks after receiving Claimants' expert report calculating their benefits loss at more than $560,000 and compounded interest of up to $11.8 million -- Chairman Steinglass first disclosed that he had a personal and professional relationship with one of the two "named" principals of the firm rendering that report. The Claimants submitted their expert's report by email to the entire arbitration panel on July 30.[105] Claimant's expert's report was on Burke, Rosen & Associates letterhead, identified John F. Burke, Jr., Ph.D. and Harvey S. Rosen, Ph.D. as principals, contained "Burke Rosen and Associates, Economists" in the signature block, and was signed "Burke Rosen & Associates, H. S. Rosen, Ph.D." Attached to the same July 30 email to the entire Split Panel was the curriculum vitae of Dr. Rosen dated May 2004 including his business address with Burke, Rosen & Associates as well as his affiliation with Cleveland State University as instructor, assistant professor, and associate professor 1966-1993 and his status as "associate professor emeritus" since November 1994.

That same day, July 30, claimants also submitted by email to the entire panel a zipped pdf file containing a "Preliminary Report" of damages for 31 of the 32 claimants.[106] Each report stated on the coversheet that it was "*Prepared by*: Harvey S. Rosen, Ph.D. [and] John F. Burke, Jr., Ph.D., *Economists*."[107] The sum of the principal amount of each Claimant's damages set forth in the Preliminary Reports was more than $560,000 and the range of interest on those damages set forth in the Reports was in the range of approximately $7.6 million (using one interest rate) to $11.8 million (using another).

Less than two months before the arbitration hearing, during a scheduled conference call on October 18, 2007 among Chairman Steinglass and various counsel for the parties, Chairman

[105] Appendix Vol. 4 at Appendix-2262.
[106] Appendix Vol. 4 at Appendix-2261.
[107] Appendix Vol. 2 at Appendix-1178.

Steinglass first announced the existence of additional information that would be the subject of a supplemental disclosure by him. Later that night, Chairman Steinglass emailed a Supplemental Disclosure Statement to the parties.[108] In that disclosure, Chairman Steinglass stated that he did not recall any contact with Dr. Rosen while both were at Cleveland State University and that their only contact since 1994 had been at social events hosted by Dr. Rosen's partner, Dr. Burke. Even more troubling was the professional and social relationship between Chairman Steinglass and Dr. Burke. Chairman Steinglass disclosed that his relationship with Dr. Burke was "*primarily* the result of my relationship with his wife, [Judge] Nancy A. Fuerst" who as a student of Chairman Steinglass at Cleveland-Marshall College of Law (emphasis added). Chairman Steinglass further stated that Judge Fuerst, Dr. Burke's wife, served on the College of Law's visiting committee, presumably during Chairman Steinglass' tenure as dean although that was unstated.

Most significantly, Chairman Steinglass revealed that Dr. Burke and his wife were donors to the law school, including endowing a scholarship fund with the University's foundation in their name for partial law school scholarships with funds that Chairman Steinglass himself was "instrumental in securing." While dean of the law school (and, presumably since, although not explicitly stated) Chairman Steinglass had dinner in Dr. Burke's home three or four times, attended social events in Dr. Burke's home, and hosted Dr. Burke in his (Chairman Steinglass') home for an annual party involving law school "outreach/development activities."

Although Dean Steinglass disclosed that Dr. Burke and his wife were donors to the law school while Steinglass was Dean, he failed to disclose the nature, scope and extent of the donations he solicited from the Burkes. According to the 2003 – 2004 Annual Report of the

[108] Appendix Vol. 2 at Appendix-2266.

Cleveland–Marshall College of Law, Dr. Burke and his wife made a contribution of between $2,500 and $4,999.[109] The 2005 – 2006 Annual Report indicates that they made another contribution of between $50,000 and $99,999. John F. Burke, III made a contribution in an undisclosed amount in both of these fiscal years.[110] Furthermore, Dr. Burke is listed as having made a contribution as a Friend of the law school only in his name in 2003 – 2004.[111] Dr. Burke and his wife have also endowed a scholarship fund for the law school in an undisclosed amount.[112] In 2007, Drs. Burke and Rosen created a scholarship in economics after retiring from the Cleveland State University Department of Economics.[113]

Based upon his belated and incomplete disclosure, Penn Central moved to recuse Chairman Steinglass. The motion was served by email (as were all filings in the case) on the Split Panel and opposing counsel at 8:08 p.m. on Friday, October 26, 2007.[114] By email notice at 7:32 a.m. the following Monday, October 29, 2007, Chairman Steinglass denied the motion to recuse.[115] In so doing, he stated that Penn Central had not applied the correct standard for recusal consideration (even though the very same standard had been applied by the District Court to recuse the neutral arbitrator in the first arbitration) but failed to apply whatever standard he thought should apply, and he failed to disclose any further information about this relationship with Dr. Burke.

[109] Appendix Vol. 4 at Appendix-2283.
[110] Appendix Vol. 4 at Appendix-2292.
[111] Appendix Vol. 4 at Appendix-2289 & 2295.
[112] Appendix Vol. 4 at Appendix-2297.
[113] Appendix Vol. 4 at Appendix-2302.
[114] Appendix Vol. 4 at Appendix-2260.
[115] Appendix Vol. 4 at Appendix-2257.

A week later, on Tuesday, November 6, 2007, Chairman Steinglass informed the parties by email that the Split Panel had conferred and decided that the "neutral" arbitrator, **not the full Split Panel**, should make the decision about recusal.[116]

In his deposition, Dr. Burke's partner, Dr. Rosen, testified that Claimants had paid his firm, Burke, Rosen and Associates, over $43,000 for services rendered up to that point in early October 2007.[117] His firm receives $425 per hour for Dr. Rosen's non-testimonial consulting services.[118] Dr. Rosen further stated in his deposition that his firm receives $1,200 for the first two hours of his testimony and $425 for each hour thereafter.[119] Dr. Rosen testified for 3½ hours at the arbitration.[120]

Clearly, to obtain contributions of this size to the Cleveland-Marshall College of Law when he was Dean, Chairman Steinglass obviously devoted considerable time and energy cultivating a relationship with Dr. Burke as demonstrated by Chairman Steinglass' written disclosure which mentioned on "three or four occasions" having dinner at Dr. Burke's home, attending other social events there such as their "annual St. Patrick's Day Party," and Dr. Burke's attendance at Chairman Steinglass' "annual holiday party."[121] As Penn Central warned in its recusal motion, "A decision in the Claimants' favor, based on the work of their experts, will enhance the reputation and future earnings of Burke, Rosen."[122]

The decision in this case, of course, was in Chairman Steinglass's exclusive control given the fact that the other two arbitrators are party arbitrators and he was supposed to be the neutral and chairman. In short, Chairman Steinglass had it within his exclusive power to assist and

[116] Appendix Vol. 4 at Appendix-2263.
[117] Appendix Vol. 4 at Appendix-2270. (p. 25, ln. 24).
[118] *Id.* (p. 25, ln. 8).
[119] *Id.* (p. 24, ln. 25).
[120] Appendix Vol. 5 at Appendix-2980-3009.
[121] Appendix Vol. 4 at Appendix-2264-65.
[122] Appendix Vol. 4 at Appendix-2277.

reward a significant benefactor. Chairman Steinglass took over 18 months after the arbitration hearing concluded and over a year after making the parties submit findings of fact and conclusions of law to render a 2-1 decision in which he berates Penn Central for its supposed delay during the history of these proceedings before his appointment. In joining the Claimants' party arbitrator, Chairman Steinglass relied exclusively on Dr. Rosen's testimony and calculations to award Claimants a total of $564,820 MPA benefits plus additional compounded prejudgment interest totaling $12,888,684 to "enhance" the benefits award.

Faced with these facts, fair-minded arbitrators and triers of fact regularly recuse themselves (or are removed for cause) when they have such close and personal relationships with a witness in a case. Where, as here, Claimants were seeking an enhancement of over 22 times their actual damages of $560,000 in prejudgment interest, the credibility and methodology of the facts and figures jointly prepared by Drs. Burke and Rosen were critical to the presentation of the Claimants' damages. Chairman Steinglass' status as the only neutral arbitrator on the Split Panel made his impartiality crucial to the integrity and fairness of the arbitration. Chairman Steinglass' resolution of the factual issue of causation – whether Claimants proved they were put in a worse position as a result of the merger – was irrational and without any foundation in the factual record and contradicted the unrebutted expert testimony to the contrary.[123] It was the result of his lack of impartiality.

The applicable case law, and the law of the case, is clear: a neutral arbitrator must be recused if the facts suggest an "appearance of partiality." As Judge Lambros set forth in his prior ruling in this case vacating a 1983 award made to the Defendants: "(the) Chairman of the arbitration panel was too closely linked with one side of the conflict and such an association created an appearance of partiality." 1985 Ruling of Judge Lambros, United States District Court

[123] Appendix Vol. 5 at Appendix-3012-29.

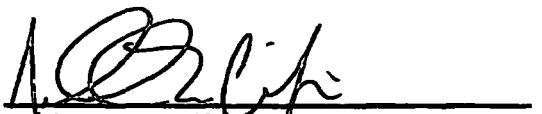
Northern District of Ohio Eastern Division, page 3; *accord Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 89 S. Ct. 337, 21 L. Ed. 2d. 301 (1968) (vacating award where "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." 393 U.S. at 150; *Ernest D. Olson v. Merrill Lynch, Pierce, Fender & Smith, Inc.; Michael Putnam*, 51 F. 3d 157 (8th Cir. 1995) (vacating award for impression of possible bias where employer did not disclose to employee that arbitrator was employed by entity having an ongoing relationship with employer and retained the same law firm as employer and that this relationship constituted a substantial interest.); *Sanko S.S. Co. v. Cook Industries, Inc.*, 495 F. 2d 1260, 1262 (2nd Cir. 1973) (Finding of district court reversed where circuit court ordered a full hearing to determine if arbitrator "might have had some interest in reaching a decision favorable to [awardee] if only to lay the groundwork for a return favor to [affiliated company] in the future.").

As evidenced by the Split Panel's improper award of over 22 times the alleged actual damages, the Split Panel's faulty reasoning and complete disregard for both the law and the controlling agreements, Chairman Steinglass' personal and professional relationship with Dr. Burke was undoubtedly the driving force behind such egregious and reversible error.

CONCLUSION

For the foregoing reasons, the arbitration decision issued by the Split Panel is the product of egregious error, fails to draw its essence from the required labor protective conditions contained in the MPA and must be overturned by the Board.

Respectfully submitted,



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APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing was sent by electronic mail and overnight delivery to the following on August 19, 2009:

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